

M25 junction 10/A3 Wisley interchange TR010030

9.4 Procedure for Using Common Land Temporarily During the Construction Period for the Scheme

Planning Act 2008
Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009



Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended)

M25 junction 10/A3 Wisley interchange

Development Consent Order 202[x]

9.4 PROCEDURE FOR USING COMMON LAND TEMPORARILY DURING THE CONSTRUCTION PERIOD FOR THE SCHEME

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Author:	M25 junction 10/A3 Wisley interchange project team, Highways England and Atkins

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1. Introduction

- 1.1.1 This document has been prepared in response to the query set out in the letter from the Planning Inspectorate titled *Planning Act 2008 – Section 88 and The Infrastructure Planning (Examination Procedure) Rules 2010 – Rule 6* etc (the “Rule 6 letter”) dated 15th October 2019.
- 1.1.2 Appendix F to the Rule 6 letter required the Applicant to prepare some additional material to aid the smooth running of the Examination, including:
- “Further explanation on the intended procedure for using Common Land temporarily during the construction period for the scheme”.*

2. Power to take temporary possession of common land

- 2.1.1 The examining authority’s attention is referred to the note provided to the Planning Inspectorate by Highways England on 7 August 2019, a copy of which is annexed (the Note).
- 2.1.2 The Note provides an explanation of the legal basis on which a development consent order (DCO) under the Planning Act 2008 (the Act) may authorise the temporary possession of common land. It also provides examples of other made DCOs which have so authorised the use of common land.
- 2.1.3 Further to paragraph 3.4 of the Note, Highways England can confirm that, as regards the application of section 139(3) of the Act in relation to the Scheme, there are no registered rights of common affecting Wisley Common and Chatley Heath, being the areas of common land affected by the Scheme. Accordingly, the Scheme will not, if it receives development consent under the Act, authorise the suspension of, extinguishment or interference with any registered rights of common.

3. Further explanation of the intended procedure for using common land temporarily during the construction period for the Scheme

- 3.1.1 As explained at paragraph 4.2 of the Note, Highways England intends to submit an application under section 38 Commons Act 2006 for consent to carry out ‘restricted works’ on common land in relation to the common land within the boundary of the Scheme over which only temporary possession powers may be exercised.
- 3.1.2 An application for consent under section 38 will be submitted to the Planning Inspectorate during the early part of the examining authority’s examination of the Scheme, with a view to the consent being obtained prior to the close of the examination.

- 3.1.3 The application will provide further information, by reference to the land parcels included within the redline boundary of the Scheme, concerning the areas of common land to which public access will be excluded temporarily during construction of the Scheme. The application will outline the purposes of the works to be undertaken under temporary possession powers, together with an explanation of the mitigation measures which will be adopted in the carrying out of temporary works on common land.
- 3.1.4 The application will also explain the relationship between the works which are to be carried out on common land under temporary possession powers and the Scheme as a whole.
- 3.1.5 The submission of the application under section 38 will give rise to an obligation on Highways England to publicise the application and invite representations to be made to the Planning Inspectorate.
- 3.1.6 Prior to submitting the application under section 38, Highways England proposes to notify the owners of the common land which is the subject of the application, in addition to other relevant parties.
- 3.1.7 Highways England will keep the examining authority updated as to the progress of the section 38 application as may be relevant to the examination for the Scheme.

Appendices

Appendix A. The Note

HIGHWAYS ENGLAND

M25 JUNCTION 10/A3 WISLEY INTERCHANGE SCHEME (THE SCHEME) (PLANNING INSPECTORATE REFERENCE TR010030)

NOTE TO PLANNING INSPECTORATE AND EXAMINING AUTHORITY ON THE POSITION IN RELATION TO TEMPORARY POSSESSION OF COMMON LAND AND CONSENT UNDER SECTION 38 COMMONS ACT 2006

1 Background

- 1.1 This note has been prepared in response to a request from the Planning Inspectorate that Highways England explains the legal basis on which a development consent order under the Planning Act 2008 may authorise the temporary possession of common land.

2 Common land

- 3 The draft development consent order (dDCO) submitted with the Application (application document reference **TR010030/APP/3.1**) contains the following powers which may be exercised over land, including common land (according to the land plot in question):-

3.1.1 the power to acquire land compulsorily (article 21 of the dDCO);

3.1.2 the power to acquire compulsorily rights over land (article 24 of the dDCO); and

3.1.3 the power to take temporary possession of land (articles 31 and 32 of the dDCO).

- 3.2 In the case of the former two powers, the Application is accompanied by a Common Land and Open Space Report (forming part of application document reference **TR010030/APP/4.1**) which, among other things, sets out how the powers may be authorised in accordance with sections 131 and 132 Planning Act 2008.

- 3.3 As regards the power to take temporary possession of common land, this power is not subject to sections 131 and 132 Planning Act 2008 on the basis that the power to take temporary possession of land is not a form of compulsory acquisition.

- 3.4 The Planning Inspectorate has asked Highways England to consider whether section 139(3) Planning Act 2008 may operate so as to preclude the grant of temporary possession powers in relation to common land. Section 139(3) provides as follows:-

(3) An order granting development consent may not authorise the suspension of, or extinguishment or interference with, registered rights of common, except in accordance with section 131 or 132.

- 3.5 Section 139(4) defines 'registered rights of common':-

(4) "Registered rights of common" means rights of common registered under—

(a) the Commons Act 2006, or

(b) the Commons Registration Act 1965.

- 3.6 The dDCO will, if made, authorise Highways England to enter on and take temporary possession of the land specified in Schedule 7 to the dDCO (article 31(1)(a)(i)). Additionally, the dDCO will authorise Highways England to take temporary possession of any other land within the Scheme limits (article 31(1)(a)(ii)). In each case, the power to enter on and take temporary possession of land may be exercised in relation to the construction and maintenance of the Scheme.
- 3.7 The temporary possession provisions are derived from well-precedented provisions in other development consent orders and enable Highways England to undertake various activities on the land, subject to those powers including the removal of buildings and structures on the land and the erection of temporary structures. The power to take temporary possession of land is subject to a general obligation to reinstate the land to its former condition, save for certain exceptions.
- 3.8 The dDCO does not exclude or modify any requirement of the Commons Act 2006, save that the compulsory acquisition of common land and of rights over common land pursuant to the dDCO may be authorised in accordance with section 139(1) Planning Act 2008 on the basis that the terms of sections 131 and 132 Planning Act 2008 (as appropriate) are or will be satisfied.
- 3.9 Articles 31 and 32 of the dDCO do not authorise the suspension or, extinguishment or interference with registered rights of common. The provisions of the Commons Act 2006 are unaffected by articles 31 and 32 which do not purport to exclude or modify their application.
- 3.10 Accordingly, were Highways England to undertake any activity on common land pursuant to the powers contained in articles 31 or 32 of the dDCO, it will be subject to the provisions of Commons Act 2006.
- 3.11 Powers to take temporary possession of common land are included in other made development consent orders, c.f. The Port of Tilbury (Expansion) Order 2019 and The Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015.

4 Works on common land under temporary possession powers

- 4.1 In order to deliver the Scheme, Highways England wishes to undertake works on common land under temporary possession powers. The rationale for undertaking works using temporary possession powers is that Highways England ought not acquire land permanently which it does not require permanently. To do otherwise, as regards common land, may require Highways England to provide replacement land in accordance with section 131 Planning Act 2008 which may not be justified by virtue of the nature of the works in question. This is explained further in the Common Land and Open Space Report (forming part of application document reference **TR010030/APP/4.1**) and the Consents and Agreements Position Statement (application document reference **TR010030/APP/3.3**).
- 4.2 To the extent that any of the works proposed to be undertaken on common land under temporary possession powers constitute 'restricted works' for the purpose of section 38 Commons Act 2006 (and therefore require the consent of the Secretary of State) Highways England will apply to the Secretary of State for consent to undertake those works. Accordingly

such works may not lawfully be carried out absent consent under section 38, irrespective of any provision made by the dDCO.

5 Conclusion

- 5.1 There is a clear and precedented legal basis for a development consent order under the Planning Act 2008 to authorise the temporary possession of common land.

BDB Pitmans LLP

7 August 2019

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